

KING'S BENCH FOR SASKATCHEWAN

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Judicial Centre: Saskatoon

BETWEEN:

JASMIN GRANDEL and DARRELL MILLS

APPLICANTS

- and -

THE GOVERNMENT OF SASKATCHEWAN and
DR. SAQIB SHAHAB in his capacity as CHIEF MEDICAL
HEALTH OFFICIER FOR THE PROVINCE OF
SASKATCHEWAN

RESPONDENTS

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JUDGMENT
September 20, 2022

KONKIN J.

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A. INTRODUCTION

[1] The applicants, Jasmin Grandel and Darrell Mills, seek a declaration pursuant to the *Canadian Charter of Rights and Freedoms* with respect to the restrictions on outdoor gatherings contained in Public Health Orders [PHOs] issued by Dr. Saqib Shahab, in his capacity as Chief Medical Officer for the Province of Saskatchewan. These restrictions limited public outdoor gatherings to 10 persons during the period of December 17, 2020 through May 30, 2021 [Outdoor Gathering Restrictions]. In argument the applicants sought to have the Court find the applicants to have standing for the PHO restricting outdoor gatherings to 10 persons as well as the previous order restricting outdoor gatherings to 30 persons. I accept that the applicants have standing to challenge only the 10-person outdoor gathering restrictions enforced between the period of December 17, 2020 through May 30, 2021. I conclude that the evidence shows that the applicants only were ticketed on activities during the 10-person PHOs. I find that even if I granted standing over the previous PHOs, the result of my decision would not change.

[2] Ms. Grandel is a resident of Regina, who recently graduated with a degree in kinesiology with a major in health promotion from the University of Regina. She became concerned when the government ordered all children, including her son who was six years old and in kindergarten at the time, to wear masks in school without sharing the information on which the decision was based. Propelled by her concern with the lack of transparency and consistency from the Government of Saskatchewan and the Saskatchewan Health Authority regarding the information on which they base their decisions, as well as the detrimental effects caused by the PHOs on small business and families, Ms. Grandel participated in peaceful outdoor protests to express her dissatisfaction with the restrictions imposed on residents of Saskatchewan.

[3] Ms. Grandel attended protests related to COVID-19 public health measures nearly every Saturday from January 2021 through July 2021. Police charged her for her alleged participation in each of these protests. She received nine summonses for the outdoor protests that she attended that had more than 10 persons in attendance. Ms. Grandel believes that the Outdoor Gathering Restrictions were being used to target her and her fellow protestors on the basis of their views, contrary to the fundamental principle of the Rule of Law.

[4] Mr. Mills is a resident of Saskatoon with 30 years' of experience in mechanical construction. He is certified in mask fit testing and trained in supplied air breathing systems. Motivated by his concern with the negative effects of improper mask wearing, unknown to the public, as well as the negative effects of limited exemptions to mask requirements available under the PHOs on people who cannot wear a mask due to psychological or physical health issues, he participated in peaceful outdoor protests against restrictions imposed by the PHOs, including the mandatory wearing of masks.

[5] Mr. Mills attended approximately five protests between December 2020 and May 2021.

[6] Ms. Grandel and Mr. Mills are two of a number of other Saskatchewan residents who have been issued summonses for exceeding the Outdoor Gathering Restrictions while gathering to protest COVID-19 related government restrictions.

[7] The remedies sought by the applicants are as outlined in the applicants' brief at para. 127:

- a. A Declaration pursuant to section 52(1) of the *Constitution Act, 1982* [Schedule B to the *Canada Act 1982* (UK), 1982, c 11] that the Outdoor Gathering Restrictions, in restricting the gathering of persons outdoors for peaceful, collective demonstrations or protests, unjustifiably infringe the freedoms of thought, opinion,

belief, expression, peaceful assembly and association as protected by sections 2(b), 2(c), and 2(d) of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”) respectively, and are therefore of no force or effect;

- b. Further and in the alternative, a Declaration pursuant to section 24(1) of the *Charter* that the Outdoor Gathering Restrictions and their enforcement constitute unreasonable and unjustified infringements of the Applicants’ freedoms of thought, belief, opinion and expression, peaceful assembly and association, as protected by sections 2(b), 2(c), and 2(d) of the *Charter* respectively; and
- c. Costs.

[8] My role is not to settle scientific or medical debates presented by the experts. The question before me is whether the PHOs, which imposed the Outdoor Gathering Restrictions, violate any *Charter* freedoms and if so, whether the respondents, the Government of Saskatchewan and Dr. Saqib Shahab [Sask], have satisfied the burden in establishing that the PHOs in issue are reasonable and justified under s. 1 of the *Charter*.

B. PRELIMINARY ISSUES

[9] There are two preliminary issues:

- 1) Should the applicants’ application to strike the affidavit evidence of Christine Rathwell [Rathwell Affidavit] be allowed?
- 2) Should Sask’s application to strike the affidavit evidence of Dr. Thomas Warren [Warren Affidavit] be allowed?

1. Should the applicants’ application to strike the Rathwell Affidavit be allowed?

[10] The applicants brought an application to strike the affidavit evidence of Christine Rathwell in its entirety on the basis that the evidence is not within the personal knowledge of the affiant and is scandalous in nature.

[11] Christine Rathwell is an employee of the Ministry of Health. The Rathwell Affidavit is comprised of numerous social media posts created by Ms. Grandel, as well as news articles containing information about Ms. Grandel.

[12] The applicants argued that information contained in the Rathwell Affidavit is not in the direct knowledge of the affiant herself contrary to Rule 13-20(1) of *The Queen's Bench Rules* for Saskatchewan. Moreover, it was argued that the Rathwell Affidavit relies on the information interpreted by third parties and is introduced for the purpose of the truth of its contents, amounting to hearsay evidence, contrary to Rule 13-30(4).

[13] The applicants rely on *Kish v Facebook Canada Ltd.*, 2021 SKQB 198 at para 49 [*Kish*], where the Court followed *Thorpe v Honda Canada, Inc.*, 2010 SKQB 39, 352 Sask R 78:

[49] Just as in *Thorpe*; it is apparent that Ms. Kish, although she has sworn that she has personal knowledge of the facts, has not provided a basis for the belief or anything to suggest that the information in all the exhibits is true, accurate, reliable and unaltered. The grounds for such information and belief must be adequately disclosed and the information reliable: *Thorpe* at para 27.

[14] As well, the applicants rely on the decision of the Court in *Kish* at paras 50-55 where the media exhibits were inadmissible pursuant to Rule 13-30 of *The Queen's Bench Rules* on the grounds that the exhibits lacked verification for reliability and the failure of the affiant to state the grounds for their belief for each of the exhibits.

[15] I find Sask's argument more compelling in that the contents of the Rathwell Affidavit are within the affiant's knowledge. According to *Kamtech Services Inc. v Cargill Canada Ltd.*, 2010 SKQB 231 at para 15:

[15] Care must be taken in the use and application of the phrase, "bald assertion". It will frequently happen that a witness or an affiant

personally knows something. The knowledge may have been acquired through observing, hearing, feeling or examining. Such an individual is entitled to state what he saw, heard, felt, examined or learned as a result of the examination.

[16] Ms. Rathwell spoke to her review of and the process she undertook to review Ms. Grandel's social media posts and media reports, which she presented without embellishment. Sask does not submit the social media for the truth of their contents, but rather to establish that they were made and apparently believed by Ms. Grandel. With respect to the media reports, Sask purports that they contain statements that "permit an inference as to the speaker's state of mind", and therefore "are regarded as original testimonial evidence and admitted as circumstantial evidence from which a state of mind can be inferred" (*R v Millard*, 2017 ONSC 5701 at para 13).

[17] The applicants argued that the contents of the Rathwell Affidavit are scandalous and have no probative value.

[18] In *Gurniak v Saskatchewan Government Insurance*, 2017 SKQB 199 at para 12, Smith J. stated:

12 The defendant's brief succinctly addresses the appropriate rules at paragraphs 5 through 10. The brief provides: ...

...

10. A pleading which pleads argument or, expressions of opinion, or conclusions are objectionable on the basis that they are scandalous, frivolous, or vexatious. In *Rebillard v. Manitoba (Attorney General)*, 2014 MBQB 181, 2014 CarswellMan 574 (Man. Q.B.), Edmond J. stated at paragraph[s] 30 and 31:

[30] In *Bellan v. Curtis et al.*, 2007 MBQB 221 ..., 219 Man. R. (2d) 175 at para. 37, the court considered the meaning of "scandalous", "frivolous" and "vexatious" in light of Queen's Bench Rule 25.11 as follows:

[37] Queen's Bench Rule 25.11 allows a court to strike a pleading that is "scandalous, frivolous or vexatious". Epstein, J., dealt with the meaning of "scandalous, frivolous or vexatious" in *George Estate v. Harris et al.*, [2000] O.T.C.

Uned. 404 (Sup. Ct.); [2000] O.J. No. 1762. At para. 20, he stated:

“The next step is to consider the meaning of ‘scandalous’, ‘frivolous’ or ‘vexatious’. There have been a number of descriptions provided in the multitude of authorities decided under this or similar rules. It is clear that a document that demonstrates a complete absence of material facts will be declared to be frivolous and vexatious. Similarly, portions of a pleading that are irrelevant, argumentative or inserted for colour, or that constitute bare allegations should be struck out as scandalous. The same applies to a document that contains only argument and includes unfounded and inflammatory attacks on the integrity of a party, and speculative, unsupported allegations of defamation. In such a case the offending statements will be struck out as being scandalous and vexatious. In addition, documents that are replete with conclusions, expressions of opinion, provide no indication whether information is based on personal knowledge or information and belief, and contain many irrelevant matters, will be rejected in their entirety.”

[31] The plaintiff’s claim is replete with conclusions, expressions of opinion, and evidence. Therefore, the statement of claim offends the rules of pleading and ought to be struck out pursuant to Queen’s Bench Rule 25.11(b).” (underlining added) [Emphasis added by defence counsel]

[19] A matter will be struck out of an affidavit if it is both irrelevant and scandalous (*R v Bank of Nova Scotia* (1983), 24 Sask R 312 (QB) at paras 11-15; *Goodtrack v Rural Municipality of Waverly No. 44*, 2012 SKQB 413 at para 20, 408 Sask R 36, as cited in *CIBC Mortgages Inc. v Kjarsgaard*, 2015 SKQB 411 at para 5). I agree with Saskatchewan’s position that the social media posts – inflammatory as they may be – were not created by Ms. Rathwell, but rather by Ms. Grandel. Moreover, as Sask outlines in their brief at para. 60, the posts are relevant to the analysis of the substantive issues as the Rathwell Affidavit shows:

- (a) That there are good reasons to suspect Ms. Grandel would not be (and was not) compliant with public health guidance at outdoor gatherings; and

- (b) That there were other methods and mediums of expression that Ms. Grandel was able to avail herself of, in lieu of outdoor gatherings.

[20] Lastly, the applicants argued that the Rathwell Affidavit should be struck on the basis that it failed to provide the expiry date of the Commissioner's power to commission contrary to s. 5(2)(b) of *The Commissioners For Oaths Act, 2012*, SS 2012, c C-16.0001. I find that this is a minor technical error and therefore it does not impact the content of the affidavit. The affidavit is still proper save and except that detail.

[21] Given these reasons, I find that the contents of the Rathwell Affidavit are relevant and not scandalous and therefore should be allowed but given limited weight aside from the two assertions above.

2. Should Sask's application to strike the Warren Affidavit be allowed?

[22] Sask seeks to strike the Warren Affidavit based on the submission that Dr. Warren is not qualified to provide an expert opinion on matters of public health.

[23] The Warren Affidavit contains evidence to support Dr. Warren's assertion that "[t]he risk of outdoor transmission of SARS-CoV-2 at outdoor protests is negligible, particularly when physical distancing is maintained" (Warren Affidavit at 2, at para 4). Dr. Warren examines the evidence for outdoor transmission of other respiratory tract infections such as tuberculosis and influenza as well as SARS-CoV-2.

[24] Dr. Warren is an infectious disease consultant and medical microbiologist. He admits that he does not have any expertise or experience in public health or preventative medicine. It is evident that he has expertise but not necessarily in the area that he is opining on. For example, he does not have a residency or fellowship in public health or preventative medicine. Moreover, his current role as an infectious disease consultant, or in any previous position, did not involve monitoring and

assessing the health needs of a population; public health advice for governments or other public bodies; a leadership or management role on matters related to public health or in any public health capacity during the outbreak of any previous epidemic or pandemic; and planning, implementing, or evaluating programs and policies to promote public health.

[25] The Court in *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23 at para 23, [2015] 2 SCR 182, set out four threshold requirements of admissibility of evidence: relevance, necessity, absence of an exclusionary rule and a qualified expert. Sask submits that the evidence tendered by Dr. Warren in his affidavit fails the fourth stage of the threshold inquiry.

[26] The crux of this application pertains to whether the public health measures adopted by Sask were a proportionate response to the COVID-19 pandemic. This calls for expertise in public health.

[27] However, I am inclined to permit the Warren Affidavit excluding the public health purview. I will limit the ambit of the Warren Affidavit to include evidence on the transmission of SARS-CoV-2 but not within the context of public health.

C. BACKGROUND

1. The Public Health Crisis

[28] To answer the questions before me, it is important to canvass the gravity of the impact COVID-19 had on communities globally and more locally in Saskatchewan. Understanding the nature of the virus and its characteristics informs us that the world was dealing with a novel virus that we knew very little about. As this virus evolved, the accompanying threat to public health presented complex challenges for public health officials and government bodies.

[29] Consequently, Saskatchewan, similar to other provinces across Canada, was required to promptly adopt effective intervention and to introduce measures to reduce the risk of COVID-19 transmission.

[30] I rely on the materials presented to the Court to illustrate the characteristics of the COVID-19 virus and the effects of the COVID-19 pandemic.

a. The Nature of the COVID-19 Virus

[31] COVID-19 is the disease caused by a new coronavirus called SARS-CoV-2. The World Health Organization [WHO] first learned of this novel virus on December 31, 2019, following reports of a cluster of atypical pneumonia cases in Wuhan, People's Republic of China. On March 11, 2020, WHO, in assessing the severity and the worldwide spread of COVID-19, characterized it as a "pandemic". A WHO report shows that as of October 22, 2021, there were 242,348,657 cases confirmed globally and 4,927,723 deaths caused by COVID-19. As of the same date, in Saskatchewan, there had been 75,842 people diagnosed with COVID-19 and 812 deaths related to the disease. Cumulatively, 4.5% of all polymerase chain reaction PCR-confirmed COVID-19 cases in Saskatchewan have required hospitalization, and 1.1% PCR-confirmed COVID-19 patients have resulted in death.

[32] Experts for both parties agree that COVID-19 is a communicable disease and capable of exponential growth, which means that the number of cases grows by a multiplication factor rather than just addition. In other words, there may be one case one day that may lead to two cases, four cases, and sixteen, etc.

[33] Transmission of an infectious disease like COVID-19 results from the interactions between agent (SARS-CoV-2), its host (people infected or susceptible to infection), and the environment that convenes the host and agent. The environment

includes the physical characteristics of a space, which takes into account the size, layout, and ventilation, and the interaction amongst people within that space, which considers the density, duration, and nature of activities.

[34] SARS-CoV-2 is transmitted person to person through respiratory droplets and aerosols from an infected person. This can occur when a person coughs, talks, sneezes, shouts, or sings, and the droplets are inhaled or come into direct contact with mucous membranes in the mouth, nose, or eyes. It is uncontroverted fact that transmission is more likely to occur in indoor spaces as compared to outdoor settings, all other factors being considered. Outdoor transmission has been associated with gatherings that facilitate close interactions, take place over an extended duration, or occur in a mixed indoor-outdoor setting. Although outdoor transmission of SARS-CoV-2 at outdoor gathering is negligible, particularly when physical distancing is maintained, the risk of transmission, albeit small, is present.

[35] Signs and symptoms of COVID-19 differ from person to person. Symptoms could include fever, cough, difficulty breathing, fatigue, loss of taste or smell, headache, abdominal pain, diarrhea or vomiting. Symptoms can persist for months following acute COVID-19, and the long-term effects of COVID-19 are not completely known. COVID-19 causes more severe symptoms, including death, in people with pre-existing medical conditions and in people over 60 years of age as people with these risk factors are more likely to be hospitalized and more likely to be admitted to intensive care units [ICUs]. That said, hospitalizations and deaths have been reported in Saskatchewan in all age groups. The virus can be spread by people who are pre-symptomatic, that is, have not yet developed symptoms, or asymptomatic, that is, never develop symptoms.

[36] SARS-CoV-2 mutates over time. As of August 24, 2021, the WHO had designated the following Variants of Concern [VOCs]: Alpha (B.1.1.7), Beta (B.1.351), Gamma (P.1), and Delta (B.1.617.2). These VOCs have higher transmissibility and cause more serious illness than the previously dominant strains. By late 2020, these had been reported globally and detected in Canada and Saskatchewan.

[37] Effective use of masks has been found to reduce the rate of infections and severe outcomes of COVID-19 in combination with other mitigation strategies that include hand hygiene and physical distancing. As there is no natural immunity to the disease in the population when it arrives, the development and administration of vaccines against SARS-CoV-2 has provided additional effective tools against COVID-19. Since December 2020, regulatory bodies around the world, including Health Canada, have authorized the use of newly developed vaccines.

b. COVID-19 in Saskatchewan

[38] The first presumptive case of COVID-19 in Saskatchewan was reported publicly on March 12, 2020. Dr. Julie Kryzanowski, the Deputy Chief Medical Health Officer with the Saskatchewan Ministry of Health, deposed that between January 8, 2020 to November 7, 2021, an epidemic curve of the COVID-19 pandemic can be described by four phases.

The first phase of the COVID-19 pandemic in Saskatchewan was characterized by peaks due to travel and local outbreaks, specifically:

- (a) The first peak of the COVID-19 pandemic occurred about three weeks after the first cases of COVID-19 were reported in Saskatchewan. This peak was largely due to travel-associated cases.
- (b) The second peak was observed in the week of May 1, 2020. This surge in cases was likely due to outbreaks in acute and long-term care facilities in North and Far North zones. Also, persistent low-level incidence was likely due to community transmission.

- (c) A smaller third peak occurred in the middle of June 2020.
- (d) A fourth peak was associated mostly with outbreaks in communities in South and Central zones between the middle and end of July 2020.

Increased community transmission started in September 2020 leading into a second phase of more widespread growth of new cases, specifically:

- (a) A peak in November 2020 driven by community transmission in the Saskatoon, Far North, and North zones, followed by a slight decline of new cases around the end of 2020.
- (b) The number of new cases increased in early January leading to a peak in mid-January 2021 followed by slight decline through February and early March 2021.
- (c) From mid-March to mid-April 2021, the numbers of new cases increased in the Regina and South-West zones driven by the emergence of VOCs in community transmission.

From mid-April to mid-August 2021, average daily numbers of new cases were lower, reflecting a third phase of slower growth of new cases.

From mid-August to early October 2021, numbers of new cases increased, reflecting a fourth phase of accelerated growth.

(Kryzanowski Affidavit at paras. 31-34, Exhibit 1 of Vol. I at R-0007 and R-0008)

2. The PHOs in Issue

[39] The PHOs challenged are no longer in effect.

[40] I will provide a summary of COVID-19 restrictions in Saskatchewan in a chronological order, which includes factors considered by Sask to determine which measures should be in place at which times during the pandemic. Then, I will discuss the PHOs that are in issue.

a. Summary of COVID-19 Restrictions in Saskatchewan

[41] On March 18, 2020, the Government of Saskatchewan declared a state of emergency in response to the COVID-19 public health emergency, pursuant to s. 18 of *The Emergency Planning Act*, SS 1989-90, c E-8.1. The following orders were made to all persons in the Province of Saskatchewan:

- (a) all persons are required to comply with any orders made by the Minister of Health pursuant to *The Public Act, 1994*, to the extent that the order does not conflict with this order or any other order pursuant to section 18 of *The Emergency Planning Act*;
- (b) all persons are required to comply with any orders issued by the Office of the Chief Medical Health Officer, to the extent that the order does not conflict with this order or any other order pursuant to section 18 of *The Emergency Planning Act*;
- (c) all persons are required to comply with any direction issued by the Saskatchewan Public Safety Agency in accordance with its powers and duties under *The Emergency Planning Act* and *The Saskatchewan Public Safety Agency Act* [SS 2019, c S-32.4], to the extent that the directive or order does not conflict with this order or any other order pursuant to section 18 of *The Emergency Planning Act*;
- (d) The Royal Canadian Mounted Police and all police services are authorized to take any reasonable action, including the power of arrest, to enforce this order, any other order pursuant to section 18 of *The Emergency Planning Act*, or any order pursuant to *The Public Health Act, 1994*.

[42] At no point between March 18, 2020 and July 11, 2021 were any gathering limits imposed by *The Emergency Planning Act*. Rather, gathering limits were imposed pursuant to *The Public Health Act, 1994*, SS 1994, c P-37.1 [*Act*] and *The Disease Control Regulations*, RRS c P-37.1 Reg 11 [*Regulations*]. Dr. Shahab authorized the issuance of a variety of orders, referred to as “public health orders”, pursuant to the *Act* and the *Regulations*. On March 19, 2020, the first PHO related to COVID-19 came into force.

[43] In April 2020, COVID-19 was designated a “category I” communicable disease pursuant to the *Regulations*, rendering it subject to reporting and tracking obligations common to all major communicable diseases. Additionally, in December 2020, new sections were added to the *Regulations* to more explicitly address the Minister’s powers to respond to COVID-19:

25.2 ...

(2) If, based on the opinion of the chief medical health officer that the increased rate of infection or the expectation of an increased risk of infection from SARS-CoV-2 is likely to cause a serious public health threat, the minister determines that it is in the public interest to do so, the minister may order that any or all of the measures set out in subsection (3) are to be taken for the purposes of preventing, reducing and controlling the transmission of SARS-CoV-2.

...

[44] The size of gatherings was contemplated in ss. 25.2(3)(b) of the *Regulations*. Pursuant to s. 2-34 of *The Legislation Act*, SS 2019, c L-10.2, the Minister’s order-making power was conferred on Dr. Shahab to make orders under s. 45 of the *Act* and s. 25.2(3) of the *Regulations* on behalf of the Minister. According to s. 61(a) of the *Act*, an individual who contravenes any provision of this *Act* or a regulation, bylaw or order made pursuant to this *Act* is subject to monetary fines.

[45] Section 25.2 of the *Regulations* expired on May 31, 2022 and was repealed after the final extension pursuant to *The Disease Control (Vaccination Programs) Amendment Regulations, 2021*, Sask Reg 118/2021, s 4.

[46] The PHOs contained measures and restrictions in hopes of mitigating the transmission of COVID-19 and were subject to regular updates to respond to current circumstances, such as regional transmission and healthcare needs.

[47] In addition to the PHOs, Sask also created and promulgated the *Re-Open Saskatchewan Plan: A plan to re-open the provincial economy* [ROSK] in an effort to supplement the PHOs with specific and detailed guidance for particular industries, businesses, and organizations. For example, as the applicants note in their brief at para. 31, ROSK permitted the following indoor gatherings while the Outdoor Gathering Restrictions were in place:

- (a) Personal services (hairdressers, barbers, massage therapy, acupuncture, tattooing and others) at 50 percent of fire-code capacity;
- (b) 30 people for event venues such as a [sic] arenas, museums, theatres and places of worship;
- (c) 50 percent capacity for retail services, 25 percent capacity for large retailers (restrictions that did not come into effect until December 25, 2020);
- (d) Attendance at a restaurant (four people allowed per table); and
- (e) Use of a gym.

[48] Section 25.1 of the *Regulations*, which authorized the creation and enforcement of the ROSK was repealed on September 1, 2021.

[49] Pursuant to the terms of each PHO, the general indoor or outdoor gathering limits of each PHO were inapplicable to a given facility or gathering where ROSK prescribed a more specific gathering limit. ROSK also imposed extensive public health measures for each facility or gathering it governed. These facilities or gatherings were subject to mandatory compliance of the public health measures imposed by ROSK.

b. Outdoor Gathering Restrictions

[50] At no point did the PHOs or ROSK create a specific gathering limit or impose specific health and safety requirements for outdoor protests. Rather, the

prevailing outdoor gathering limits on all unstructured outdoor gatherings in the PHOs applied to outdoor protests.

[51] The outdoor gathering limits in the PHOs issued by Dr. Shahab have changed several times:

Order	Coming into force	Outdoor gathering limit
March 17, 2020	March 17, 2020	50 people, if any of the attendees had travelled internationally in the last 14 days.
March 26, 2020	March 26, 2020	10 people
June 7, 2020	June 8, 2020	30 people
December 14, 2020	December 17, 2020	10 people
May 28, 2021	May 30, 2021	150 people
July 11, 2021	July 11, 2021	All previous limits rescinded.

(Kryzanowski affidavit at para. 47, Exhibit 1 of Vol. I at R-0012)

[52] As indicated in the chart, the last PHO with a gathering limit expired on July 11, 2021. However, the Outdoor Gathering Restrictions at issue concern those PHOs that allowed an outdoor gathering limit of 10 persons or less, between December 17, 2020 and May 30, 2021. Effective May 30, 2021, the limit of outdoor gatherings was raised to 150 persons and by July 11, 2021, all previous gathering limits were rescinded.

[53] Until COVID-19 vaccines were approved for use and widely available in Canada, other public health measures were the only available interventions to prevent or reduce the spread of the virus. Public health measures are interventions to prevent or limit the spread of the virus that include, but are not limited to:

- (a) Personal protective measures (e.g. vaccination, mask wearing, hand hygiene;

- (b) Environmental measures. For example, cleaning and disinfection of surfaces, ventilation;
- (c) Case investigation and management measures. For example, contact tracing, isolation, and quarantine;
- (d) Physical distancing measures. For example, gathering size and capacity limits; and
- (e) Movement control measures. For example, symptom screening, travel restrictions.

(Kryzanowski affidavit at para. 20, Exhibit 1 of Vol. I at R-0005)

[54] Limits on gathering sizes were an important public health measure as non-pharmaceutical measures. This measure was expected to help limit the spread of COVID-19, minimize the number of people with severe disease, and reduce the risk of overburdening the healthcare system. Sask relied on the following non-exhaustive factors associated with gatherings, including outdoor gatherings:

First, gatherings that bring together members of more than one household contribute to the spread of virus among households. As noted above, the SAR [secondary attack rates] among household members is high, meaning that a person who becomes infected at a gathering is very likely to infect susceptible members of their household, even if those members did not attend the same gathering. Those household members may then infect their other contacts.

Second, even small amounts of transmission at gatherings can have a significant impact on the overall spread of the virus across the province. While each individual gathering may result in a relatively small risk of additional cases, the cumulative impact of many such gatherings can result in a significant increase in transmission across the province.

Third, the larger the gathering, the greater the likelihood that there will be individuals in that gathering who have COVID-19 and will transmit the virus to others.

Fourth, limits on gathering size must be assessed within the context of the number of COVID-19 cases in the general population. The risk of transmission at a gathering is related to the likelihood that people who are present at a gathering will have COVID-19, which increases as the prevalence of COVID-19 in the general population increases.

Fifth, the increase in the number of COVID-19 cases caused by VOCs further increased the risk of transmission, including the risk of transmission at gatherings. As noted above, the VOCs reported to be present in Saskatchewan are associated with increased transmissibility of COVID-19 and some are associated with increased disease severity. As the proportion of VOCs increases, so too does the risk of transmission, particularly when there is already a high number of COVID-19 cases in the general population.

Sixth, when assessing the overall risk of COVID-19 transmission, it is important to consider not only the risk of transmission at the gathering itself, but also the risks of activities that may be connected to, or associated with, the gathering. For example, people may acquire or spread COVID-19 when they travel to and from gatherings. People may use a variety of travel methods, including public transportation where individuals may be in close in *[sic]* contact with each other or carpooling in a small, enclosed vehicle, possibly without masks.

In addition, people may travel to a gathering from a variety of different communities, which risks spreading COVID-19 from one community to another. The larger the gathering, the more people that will travel to that gathering and the greater the risk that the gathering will contribute to the overall spread of COVID-19 across the province.

(Kryzanowski affidavit at paras. 51-57, Exhibit 1 of Vol. I at R-0013 and R-0014)

c. The Specific PHOs in Question

[55] I rely on uncontroverted facts outlined in the affidavit of Dr. Kryzanowski to describe the state of the Province of Saskatchewan at the time the PHOs containing the Outdoor Gathering Restrictions were introduced.

[56] In December 2020, the healthcare system was overwhelmed by a sudden increase in patients requiring care, many being admitted to the ICUs. This was described as the second “phase” of the pandemic.

[57] In January 2021, the continuing and escalating threat of COVID-19 in Saskatchewan was evidenced by the province having the highest case rate in Canada, at 143/100,000. The COVID-19 related mortality rate during the months of December

2020 and January 2021 was also the highest the province had experienced since the beginning of the pandemic, a total of 238 deaths occurring within those two months. Other surveillance monitoring indicators including the test positivity rate, effective reproductive rate, outbreaks and hospitalizations were also high. Additionally, it was evident that the risk of SARS-CoV-2 transmission in communities existed throughout the province. Modeling from December 2020 and January 2021 predicted that Canada could remain on a rapid growth trajectory, which indicated a stronger response, through a combination of measures, in order to prevent severe illness and death. The emergence of the more highly contagious VOC added to the growing risk of uncontrolled community transmission. Between November 8, 2020 and January 24, 2021, weekly records for deaths due to COVID-19 were broken ten times over in thirteen weeks.

[58] With minor exceptions, all monitoring indicators showed concerning trends. The virus' effective reproduction number (R_t) ranged between 1.5 and 1.9, indicating exponential growth. Test positivity ranged between 6.9% and 11.0%, nearly double the target of less than 5%, indicating a high proportion of undiagnosed positive cases.

[59] Vaccination remained largely unavailable and no anti-viral treatments were available.

[60] Most of the transmission was known to occur in indoor and crowded settings, and the research regarding outdoor transmission was limited. However, without restrictions to private and public gatherings, during periods of high community transmission and high incidence of COVID-19 cases, there was greater probability that people may attend gatherings while they are infectious, regardless of the presence of symptoms.

[61] The above-noted factors contributed to the risk that even small gatherings indoors or outdoors would have increased the spread of COVID-19 in Saskatchewan when the prevalence of COVID-19 (particularly VOCs) was high. Limits on gathering sizes helped to reduce the risk of overall COVID-19 transmission across Saskatchewan, even if any particular gathering might not necessarily have resulted in transmission.

[62] A holistic, multi-layered approach was introduced to reduce the risk of COVID-19 transmission. Individual and population level measures – including gathering restrictions – were implemented.

[63] The Outdoor Gathering Restrictions remained in force until May 28, 2021, when it was repealed as part of Step 1 of the *Re-Opening Roadmap*, which wound down other public health measures in response to thresholds in population-wide vaccination uptake. The PHOs had their intended effect. The infection rate plateaued and fell slowly over the spring, fueled by a surge in VOCs, particularly in the Regina area.

D. ISSUES

[64] This judgment will deal with the following substantive issues:

1. Did the PHOs violate the freedoms of thought, belief, opinion and expression, peaceful assembly, and association protected by ss. 2(b), 2(c), and 2(d) of the *Charter*?
2. Has Sask provided sufficient evidence to demonstrably justify its restrictions of outdoor gatherings, including protests, as reasonable in a free and democratic society?

E. STANDARD OF REVIEW

[65] Sask purports that the proper standard of review is reasonableness governed by *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653, informed by *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*], in cases where the *Charter* is engaged. The Court in *Beaudoin v British Columbia*, 2021 BCSC 512 at para 216, [2021] 10 WWR 501 [*Beaudoin*], stated:

[216] Under the *Doré* analysis, the issue is not whether the exercise of administrative discretion that limits a *Charter* right is correct (i.e., whether the court would come to the same result), but whether it is reasonable (i.e., whether it is within the range of acceptable alternatives once appropriate curial deference is given). An administrative decision will be reasonable if it reflects a proportionate balancing of the *Charter* right with the objective of the measures that limit the right.

[66] The PHOs, in and of themselves, are not enabling statute. Rather, they are an administrative decision made through a delegation of discretionary decision-making authority under the *Act*. Since the PHOs are a discretionary administrative decision of “general application”, a clear-cut decision cannot be made with respect to the framework to be applied.

[67] In *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para 40, [2015] 1 SCR 613, Abella J. explained the “analytical harmony” between the proportionality analyses required by the *Oakes*, [1986] 1 SCR 103 [*Oakes*], and *Doré* frameworks:

[40] A *Doré* proportionality analysis finds analytical harmony with the final stages of the *Oakes* framework used to assess the reasonableness of a limit on a *Charter* right under s. 1: minimal impairment and balancing. Both *R. v. Oakes*, [1986] 1 S.C.R. 103, and *Doré* require that *Charter* protections are affected as little as reasonably possible in light of the state’s particular objectives: see *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160. As such, *Doré*’s proportionality analysis is a

robust one and “works the same justificatory muscles” as the *Oakes* test: *Doré*, at para. 5.

[68] Given that both the *Oakes* and *Doré* tests work the “same justificatory muscles: balance and proportionality” (*Doré* at para 5), I conclude that either test should lead to the same substantive outcome regarding the constitutional challenges. Nevertheless, I will apply the *Oakes* test pursuant to *Oakes*, with correctness being the standard of review. If the review satisfies the *Oakes* test it should also satisfy *Doré* where the standard is “reasonableness”.

[69] The court in *Oakes* at 139 noted:

70. Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".

[Emphasis added in the original]

[70] In summary, there are four criteria to be satisfied by the PHOs that qualify them as a reasonable limit that can be demonstrably justified in a free and democratic society:

- (1) Sufficiently important objective: the PHOs must pursue an objective that is sufficiently important to justify limiting a *Charter* right;

- (2) Rational connection: the PHOs must be rationally connected to the objective;
- (3) Minimal impairment: the PHOs must impair the right no more than is necessary; and
- (4) Proportionate effect: the PHOs must not have a disproportionately severe effect on the persons to whom it applies.

[71] I will discuss each stage of the *Oakes* test in detail.

F. ANALYSIS

1. Did the PHOs violate the freedoms of thought, belief, opinion and expression, peaceful assembly, and associated protected by ss. 2(b), 2(c), and 2(d) of the *Charter*?

[72] Before embarking on the *Oakes* analysis, I must determine whether there was a violation of any *Charter* rights.

a. Did the PHOs violate s. 2(b) of the *Charter*?

[73] Section 2(b) of the *Charter* reads as follows:

2. Everyone has the following fundamental freedoms: ... (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; ...

[74] Sask concedes that the PHOs violate s. 2(b) of the *Charter*.

[75] The test in identifying s. 2(b) in *Irwin Toy Ltd. v Québec (Attorney General)*, [1989] 1 SCR 927 [*Irwin Toy*], is most recently restated in *Canadian Broadcasting Corp. v Canada (Attorney General)*, 2011 SCC 2 at paras 33 and 38, [2011] 1 SCR 19:

[33] In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, Dickson C.J. and Lamer and Wilson JJ. proposed a

two-step analysis for determining whether a given expressive activity is protected by the *Charter*. The court must first ask whether the activity falls within a sphere protected by freedom of expression, and if the answer is yes, it must then inquire into the purpose or effect of the government action in issue so as to determine whether freedom of expression has been restricted (pp. 967 and 971).

...

[38] In sum, to determine whether an expressive activity is protected by the *Charter*, we must answer three questions: (1) Does the activity in question have expressive content, thereby bringing it, *prima facie*, within the scope of s. 2(b) protection? (2) Is the activity excluded from that protection as a result of either the location or the method of expression? (3) If the activity is protected, does an infringement of the protected right result from either the purpose or the effect of the government action? (*Criminal Lawyers' Association*, at para. 32, summarizing the test developed in *City of Montréal*, at para. 56).

[76] Sask concedes that the applicants' protest activities meet the criteria in *Irwin Toy* in that the protests have expressive content and there is nothing to suggest the removal of the protection of this expression. Due to Sask's concession on s. 2(b) of the *Charter*, I will not engage the third stage of the *Irwin Toy* test as this alternate route to a *Charter* infringement is redundant.

b. Did the PHOs violate ss. 2(c) and 2(d) of the *Charter*

[77] Section 2(c) of the *Charter* protects the freedom of peaceful assembly whereas s. 2(d) guarantees freedom of association.

[78] Sask argues that given the concession on s. 2(b) of the *Charter*, ss. 2(c) and 2(d) do not require an independent analysis in this case. I agree with Sask, in the circumstances of this case, to have the interest protected in ss. 2(c) and 2(d) subsumed by the s. 2(b) analysis of the *Charter*.

[79] Moreover, this case is similar to recent COVID-19 related decisions. For example, the Court in *Ontario v Trinity Bible Chapel*, 2022 ONSC 1344 at para 115 [*Ontario Churches*], declined to conduct separate analyses under ss. 2(b), (c), and (d), but rather subsumed them under s. 2(a) analysis. In *Gateway Bible Baptist Church v Manitoba*, 2021 MBQB 219 at paras 212-213, [2022] 3 WWR 567, the Court stated that there is relatively little jurisprudence on interpreting s. 2(c) and that “[a]s the freedom of assembly can often be integral to freedom of expression, issues surrounding peaceful assembly are often subsumed under the freedom of expression and the infringement can be often resolved under s. 2(b).” The Court subsumed s. 2(c) into s. 2(b) analysis given Manitoba’s concession to the *prima facie* violation of s. 2(b) in the specific context of protests. Section 2(d) was not pled in that case.

[80] Given that there is no established test for s. 2(c) analysis and so long as the freedom of expression analysis sufficiently accounts for the assemblage and associative rights engaged, I see no need to duplicate the analysis across multiple *Charter* rights as expressed in *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 77, [2018] 2 SCR 293.

2. Has Sask provided sufficient evidence to demonstrably justify the PHOs under s. 1 of the *Charter*?

a. Context and Deference

[81] Section 1 of the *Charter* reads as follows:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[82] Section 1 analysis calls for a highly context-sensitive analysis. Examining the context is central in determining whether deference is appropriate in the *Oakes* test

and where it is appropriate. The context will inform the level of deference incorporated at each stage of the s. 1 analysis, not at the outset (*M. v H.*, [1999] 2 SCR 3 at paras 80-81; *Taylor v Newfoundland and Labrador*, 2020 NLSC 125 at para 416).

[83] I agree with the Court in *Ontario Churches* at para 126 in that greater deference is owed where “public officials are dealing with a complex social problem, balancing the interests of competing groups, or seeking to protect a vulnerable segment of the population.” Sask was charged with the task of protecting public health during an unprecedented public health emergency involving serious illness and death, which was disproportionately impacting the most vulnerable. As well, this task engaged the balancing act of curbing transmission of SARS-CoV-2 on one hand and managing the impact of COVID-19 on social and commercial activities all within the context of evolving knowledge about COVID-19 and newly emerging VOCs.

[84] Sask could not wait for scientific certainty in order to act in a situation where catastrophic loss of life was at risk. As such, I find the precautionary principle to be essential in this case. Dr. Khaketla’s Report explains that “when an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically” (Dr. Khaketla affidavit at 14, Exhibit B of Vol III at R-1372).

[85] I find that the enactment of the PHOs restricting outdoor gatherings was not politically driven as challenged by the applicants in argument. This is a government that, for the most part, have a proclivity to foster personal rights and freedoms. It is incongruous to conclude that the public health measures were politically fueled. In addition, other provinces had more stringent restrictions in outdoor gatherings, some allowed more. Accordingly, I am inclined to give more deference to Sask.

[86] With the benefit of hindsight to reflect on the public health measures enacted in the height of the pandemic, we can all see things which we would wish had been done differently or not at all. Even so, it is difficult to come to a consensus as to what the right balance is or should have been. Some feel the public health measures were too restrictive, whereas for others, they were lenient. Leaving aside the competing viewpoints, the essence of the analysis is to evaluate the public health measures at the time they were enacted without the retroactive lens through which we view the PHOs. I am guided by Pomerance J. in *Ontario Churches* at para 128:

128 ... This mix of conflicting interests and perspectives, centered on a tangible threat to public health, is a textbook recipe for deferential review. As it was put by Joyal C.J. in *Gateway*, at para. 292, the court must “be guided not only by the rigours of the existing legal tests, but as well, by a requisite judicial humility that comes from acknowledging that courts do not have the specialized expertise to casually second guess the decisions of public health officials, which decisions are otherwise supported in the evidence.”

[87] With that, I will turn to the integral elements of the *Oakes* test.

b. Was there a pressing and substantial objective to enact the PHOs?

[88] Sask asserts that the PHOs, including the Outdoor Gathering Restrictions, were enacted for the express purpose of “preventing, reducing and controlling the transmission of SARS-CoV-2” pursuant to s. 25.2(3) of the *Regulations*. The protection of Saskatchewan residents from a potentially fatal and novel virus amidst a pandemic of said virus is pressing and substantial. Given the context in December 2020 where Saskatchewan was in a dire state with respect to increasing deaths and ICU admissions related to COVID-19, it is difficult to argue the contrary.

[89] For these reasons I agree that there is a pressing and substantial objective to enact the Outdoor Gathering Restrictions.

c. Were the PHOs rationally connected to the objective?

[90] According to *Oakes* at 139, the measures adopted must not be “arbitrary, unfair or based on irrational considerations” and “must be carefully designed to achieve the objective in question”. In order to show a rational connection, Sask must demonstrate a “causal connection between the infringement and the benefit sought on the basis of reason or logic. To put it another way, the government must show that the restriction on rights serves the intended purpose. This must be demonstrated on a balance of probabilities.” (*RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199 at para 153 [*RJR-MacDonald*]).

[91] I accept Sask’s position that COVID-19 is transmitted from person to person. Although the risk is lower in outdoor settings and as the applicants point out that Sask failed to identify a single transmission of SARS-CoV-2 that occurred at an outdoor protest, the risk of transmission remains. The logical nexus is reinforced by the type of activities that took place during unstructured outdoor gatherings, including at the protests the applicants attended, such as chanting, shouting, embracing, and carpooling. As well, the attitude of the protestors in their reluctance to disclose their attendance to contact tracers and to test for COVID-19 made it difficult to prove as a fact that transmission occurred at pandemic-related protests.

[92] Additionally, the applicants submit that restricting outdoor gatherings to 10 persons or less lacks rationality since Sask simultaneously permitted larger in-person gatherings in indoor settings with a higher transmission risk. Suffice to say, the restrictions pertaining to unstructured outdoor gatherings cannot be compared to in-person gatherings in indoor settings that were subject to mandatory compliance of public health measures under ROSK.

[93] Sask has demonstrated that “it is reasonable to suppose that the limit may further the goal, not that it will do so” (*Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 48, [2009] 2 SCR 567 [*Hutterian Brethren*]; *RJR-MacDonald* at para 153). Consequently, the Outdoor Gathering Restrictions were rationally connected to the objective of averting, diminishing, and managing the transmission of SARS-CoV-2.

d. Did the PHOs minimally impair the Charter freedoms they violate?

[94] The minimal impairment test is where deference comes into play in a significant manner. Courts are inclined to extend a healthy dose of deference to governments at this stage of the *Oakes* test. The question is whether, in pursuit of the objectives, the Outdoor Gathering Restrictions fall “within a range of reasonable alternatives” (*RJR-MacDonald* at para 160). In other words, are the Outdoor Gathering Restrictions proportionate in their overall impact in the context of public health measures in a pandemic.

[95] The test is a rigorous one in that the impugned measures must be “reasonably tailored to its objectives...having regard to the practical difficulties and conflicting tensions that must be taken into account” (*R v Sharpe*, 2001 SCC 2 at para 96, [2001] 1 SCR 45). Additionally, “in considering whether the government’s objective could be achieved by other less drastic means, the court need not be satisfied that the alternative would satisfy the objective to *exactly* the same extent or degree as the impugned measure” (emphasis in the original) (*Hutterian Brethren* at para 55). In other words, minimal impairment “does not literally translate into the least intrusive choice imaginable” (*Ontario Churches* at para 139).

[96] As held in *Canada (Attorney General) v JTI-Macdonald Corp.*, 2007 SCC 30 at para 41, [2007] 2 SCR 610:

41 Deference may be appropriate in assessing whether the requirement of rational connection is made out. Effective answers to complex social problems, such as tobacco consumption, may not be simple or evident. There may be room for debate about what will work and what will not, and the outcome may not be scientifically measurable. Parliament's decision as to what means to adopt should be accorded considerable deference in such cases.

Further, at para. 43, the Court noted:

43 ... There may be many ways to approach a particular problem, and no certainty as to which will be the most effective. It may, in the calm of the courtroom, be possible to imagine a solution that impairs the right at stake less than the solution Parliament has adopted. But one must also ask whether the alternative would be reasonably effective when weighed against the means chosen by Parliament. To complicate matters, a particular legislative regime may have a number of goals, and impairing a right minimally in the furtherance of one particular goal may inhibit achieving another goal. Crafting legislative solutions to complex problems is necessarily a complex task. It is a task that requires weighing and balancing. For this reason, this Court has held that on complex social issues, the minimal impairment requirement is met if Parliament has chosen one of several reasonable alternatives: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Irwin Toy*.

[97] The applicants' submission pertaining to this stage of the *Oakes* test relies heavily on the imposition of stricter numerical limits on outdoor gatherings, including outdoor protests, as compared to indoor events and activities. This is premised on the fact that Sask was knowledgeable about gathering outdoors being safer than indoor settings. As a result, the Outdoor Gathering Restrictions stand contrary to impairing the *Charter* rights "as little as possible" (*Irwin Toy* at para 79).

[98] In response, Sask presents four reasons why they disagree with the applicants' submission.

[99] First, the discrepancy in the limits between the two settings does not necessarily mean that the Outdoor Gathering Restrictions should have been higher. Sask did not have the luxury of debate in the context of a raging pandemic. They were

required to act promptly and effectively, applying the precautionary principle. Considering the overwhelming effect of the pandemic on Saskatchewan's population and healthcare system, the Outdoor Gathering Restrictions were within the range of reasonable alternatives.

[100] Second, the existence of ROSK allowed for outdoor gatherings to be unstructured whereas the indoor gatherings were subject to layered protocols and protections that were mandatory. Comparing the two types of gathering settings is outside the purview of "a comparison of comparables" (*Beaudoin* at para 229; *Ontario Churches* at para 153).

[101] Third, there were cogent reasons to have preferred a lower gathering limit as opposed to imposing ROSK-like protections on unstructured outdoor gatherings, particularly protests. Sask outlines these reasons at para. 141 of their brief:

141 ...

- a) The Applicants, and others with them, failed to maintain mandatory social distancing or adopt even basic COVID-19 mitigation measures to offset their flagrant non-compliance with the Outdoor Gathering Limit. Non-compliance is a serious concern in COVID-19 public health regulation [*E.g. Ontario Churches*, at para 153; *Taylor*, at paras 472-475].
- b) This is borne out by other provinces' experiences with pandemic-related protests during this time. For instance, while Alberta might have exempted public protests from gathering limits, several injunction and contempt applications were required to address rally attendees' non-compliance with basic COVID-19 measures, such as masking, social distancing, and prohibitions on the service of food [See e.g. the injunctions addressed in the companion cases of *Alberta Health Services v Scott*, 2021 ABQB 490; *Alberta Health Services v Pawlowski*, 2021 ABQB 813; *Alberta Health Services v Johnston*, 2021 ABQB 508. See also *Canadian Civil Liberties Association v Nova Scotia (Attorney General)*, 2021 NSCA 65].
- c) The lack of structure at protests and other gatherings to which the Outdoor Gathering Limit applied is also serious concern. Unlike movie theatres, retail stores, or other indoor gatherings

governed by the ROSK, there is no person or corporation who can be held accountable for misconduct, and no practical way for organizers to admit or exclude non-compliant attendees.

- d) In many facilities where the ROSK applied—particularly food distribution locations (*e.g.* grocery stores), public eating establishments (*e.g.* restaurants and bars), pools, hotels, and personal services (*e.g.* salons and tattoo parlors)—the facility is already regulated by public health [Each of which is licensed and regulated pursuant to *The Public Health Act, 1994*, particularly and respectively:

The Food Safety Regulations, RRS c P-37.1 Reg 12; *The Public Accommodation Regulations*, RRS c P-37.1 Reg 3, *The Swimming Pool Regulations*, 1999, RRS c P-37.1 Reg 7, and *The Health Hazard Regulations*, RRS c P-37.1 Reg 10. For the list of general categories of regulated businesses, see section 46(1)(l) of the Act]. These operators are generally both able and willing to comply with public health measures. This is not true of *ad hoc* or unstructured gatherings, including protests.

- e) Limiting the number of attendees at unstructured gatherings restricted the social mixing that could occur before and after such gatherings, including carpooling, set-up and take-down, and social visits, which could only partially be mitigated with controls at the event itself.

[102] Fourth, both primary and secondary transmission must be considered. Limiting outdoor gatherings could reasonably be expected to have indirect benefits on the rates of infection.

[103] Similar to the applicants in *Ontario Churches*, the applicants rely on evidence tendered by Dr. Warren in that risk of outdoor transmission is negligible at best. Operating on this basis, the Outdoor Gathering Restrictions they submitted were not minimally impairing. The Court in *Ontario Churches* did not see this as “a fair characterization of the evidence in this case” (*Ontario Churches* at para 149). I concur and find the same principle applies in this case.

[104] If all things were equal with participants in both settings fully adhering to the COVID-19 protocols and measures – physical distancing, absence of factors increasing risk of transmission – perhaps, it may be feasible to equate risk of outdoor transmission to risk in indoor settings. However, this is not the case. The applicants at outdoor protests did not adhere to the COVID-19 protocols such as physical distancing, testing for COVID-19 before and after attendance, registering participants. As well, they engaged in activities that increased the risk of transmission such as shouting or chanting, prolonged periods of contact, hugging, carpooling, travelling from different communities, and handing items back and forth.

[105] Similar to the experiences of Ontario as described in *Ontario Churches* at para 150, Sask:

150 ... did not need to wait for definitive evidence on outdoor transmission before it imposed limits. At the time outdoor limits were imposed, the public health system was overburdened and approaching a breaking point. At times when community risk was elevated, the health care system was sufficiently fragile that even a small number of infections could have dire consequences. During those periods, even lower risk activities such as outdoor gatherings could increase pressure on the health care system.

[106] Given the rationale provided by Sask, coupled with the standard not being scientific certainty in relation to providing “proof” of transmission, I find the Outdoor Gathering Restrictions to be minimally impairing.

e. Did the PHOs proportionally balance their deleterious and salutary effects?

[107] The deleterious effects that emanate from the violation of the *Charter* must be proportionate to the salutary benefits that will result if its objective is achieved. This refers to the “impact of the law on protected rights against the beneficial effect of the law in terms of the greater public good” (*Carter v Canada (Attorney General)*, 2015 SCC 5 at para 122, [2015] 1 SCR 331).

[108] It was the applicants' position that Sask has failed to demonstrate that restricting outdoor protests led to reduced transmission as Sask was unable to point to a single transmission of SARS-CoV-2 at any outdoor protest that occurred in Saskatchewan. In addition, as noted at para. 111 of the applicants' brief, restricting a protest to 10 persons or less "can hardly be called a protest".

[109] Sask responded to this issue in that like all other activities during COVID-19, much collective action moved online during the pandemic. The Rathwell Affidavit speaks to how the applicants communicated, networked, and planned on online platforms. The applicants were able to express themselves online, communicate with each other online, and relay their opinions directly to government officials online. Granted, online gatherings are not the perfect substitute for in-person ones by any means, but the applicants did have alternative avenues available to express themselves.

[110] In addition, at no point was public protest prohibited. As long as there was physical distancing at protests, there was nothing hindering the applicants from organizing and participating in multiple outdoor gatherings of 10 persons or less, concurrently or consecutively.

[111] The applicants argued that the "jurisdictional scans" which compared Saskatchewan's gathering limits with those enacted in other provinces did not share the whole story as noted in the applicants' brief at para. 114:

114 [t]hese "jurisdictional scans" were particularly inaccurate or incomplete in representing other provinces' approach to outdoor protests. For example, the "jurisdictional scans" failed to note that BC had expressly exempted outdoor protests from its public health restrictions beginning on February 10, 2022 [Exhibit C, Kryzanowski Transcript, February 10, 2021 Gatherings and Events Order], or the fact that in March 2021, BC had consented to a Court order striking down its earlier prohibition on outdoor protests as of no force and effect [*Beaudoin* at para. 147]. The "jurisdictional scans" noted Alberta's prohibition on "outdoor social gatherings" [See

Kryzanowski Affidavit, Exhibit P, R-1268] but did not consider that that restriction did not prohibit outdoor public protests.

[112] In a different perspective, Sask did not opt for the most draconian measure to combat the pandemic, such as complete lockdowns for extended periods. The measures as reflected in the PHOs were calibrated, reviewed, and readjusted on a regular basis and were informed by statistical data on VOCs, rates of vaccination, infection, hospitalization, and ICU capacity.

[113] In any case, the outcome bears some proof that the restrictions may have helped. It certainly would have been preferable to have information on the impact of each public health measure. However, that is not the case and we may never know the true impact of each public health measure.

[114] With regard to the final stage of the *Oakes* test, I find that the salutary effects of the Outdoor Gathering Restrictions outweighed the deleterious effects, and therefore Sask's decision to impose limits on outdoor gatherings is proportional.

[115] In a state of public health emergency wreaking severe havoc on the health of Saskatchewan residents, Sask was burdened with the immense task of balancing multiple interests.

[116] I find that Sask's PHOs which imposed the Outdoor Gathering Restrictions violated the *Charter* right of freedom of expression as articulated in s. 2(b). I also find that Sask has met its burden to establish that the Outdoor Gathering Restrictions are reasonable, demonstrably justifiable in a free and democratic society and are therefore saved pursuant to s. 1 of the *Charter*.

G. CONCLUSION

[117] My answers to the substantial issues before me are as follows:

1. Did the PHOs violate s. 2(b) of the *Charter*?

Yes.

2. Did the PHOs violate ss. 2(c) and 2(d) of the *Charter*?

Sections 2(c) and 2(d) are subsumed into the analysis of section 2(b).

3. Has Sask provided sufficient evidence to demonstrably justify the PHOs under s. 1 of the *Charter*?

Yes.

[118] For the foregoing reasons, I find that I must dismiss this application.

H. COSTS

[119] Given the fact that the applicants have raised reasonable issues for this review, I decline to award costs against them.


D.B. KONKIN